

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1622

B
PLS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
LILLIAN WILLIAMS,

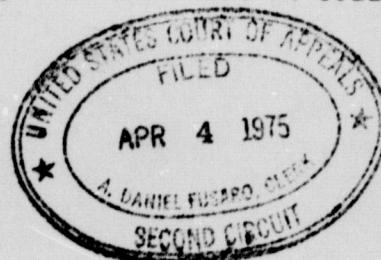
Plaintiff-Appellant,

-against-

ELLIOT L. RICHARDSON, Secretary
of Health, Education and Welfare,

Defendant-Appellee.
----- x

DOCKET NO. 74-1622



JOINT APPENDIX

| | <u>Page</u> |
|---|-------------|
| 1. Decision of Hearing Examiner, Hon. Harry J. Sands, dated March 17, 1970. | 1 |
| 2. Opinion of the Office of General Counsel of the Department of Health, Education and Welfare by Melvin Blumenthal, Assistant General Counsel, dated August 7, 1970. | 6 |
| 3. Decision of Appeals Council dated October 12, 1970. | 10 |
| 4. Plaintiff's complaint filed November 17, 1970. | 15 |
| 5. Defendant's answer filed March 23, 1971. | 18 |
| 6. Notice of motion for summary judgment for plaintiff dated January 16, 1974. | 20 |
| 7. Memorandum of Law in support of motion for summary judgment submitted January 16, 1974. | 21 |
| 8. Memorandum of Law in opposition to plaintiff's motion for summary judgment dated March 13, 1974. | 31 |
| 9. Order dated March 20, 1974, denying plaintiff's motion for summary judgment and dismissing complaint. | 44 |
| 10. Notice of Appeal filed April 25, 1974. | 48 |

PAGINATION AS IN ORIGINAL COPY

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

HEARING EXAMINER'S DECISION

In the case of

Lillian Williams for
Kendall Lee Williams

(Claimant)

James O. Williams

(Wage Earner) (Leave blank if same as above)

Claim for

Child's Insurance Benefits

236-10-2228

(Social Security Account Number)

This case is before the Hearing Examiner upon a request for hearing filed on June 10, 1969, by Lillian Williams on behalf of Kendall Lee Williams, the claimant, on the social security account of James O. Williams, deceased wage earner, who disagrees with the determination of the Social Security Administration that she is not entitled to child's insurance benefits on behalf of Wendell Lee Williams.

The claimant on October 18, 1967, filed with the Administration an application for surviving child's insurance benefits on behalf of Wendell Lee Williams. The Administration disallowed the application on March 20, 1968, on the grounds that the child, Wendell Lee Williams, was not adopted by the claimant within two years of the death of James O. Williams, the wage earner, or that the deceased wage earner had instituted proceedings to adopt the child before his death. The claimant requested reconsideration on October 1, 1968. Notice of disallowance after reconsideration was given to the claimant by letter dated February 7, 1969. The claimant disagreed with the Administration's reconsidered determination and requested a hearing.

STATEMENT OF ISSUES AND APPLICABLE LAW

The general issues before the Hearing Examiner are whether or not the child, Wendell Lee Williams is entitled to child's insurance benefits, within the meaning of the Social Security Act, as amended.

The specific issues are whether or not the child, Wendell Lee Williams, was adopted within two years of the death of the wage earner, James O. Williams, or that the deceased wage earner had

ONLY COPY AVAILABLE

instituted proceedings to adopt the child before his death; or whether or not the child may be deemed to be the legally adopted child of the wage earner as of the date of death, or equitably adopted by the wage earner before his death for purposes of entitlement to child's insurance benefits.

Section 202(g) of the Act provides in effect that the widow of a worker is eligible for mother's insurance benefits on that worker's earnings record if among other conditions, she has in her care a child of the worker entitled to child's insurance benefits (for entitlement to widow's insurance benefits, a widow need not have an entitled child, or any child in her care but she must have attained age 50 under certain conditions and be disabled or age 60 to receive reduced widow's benefits or age 62 to qualify for full widow's benefit payments).

Section 216(e) provides as pertinent to this case: "The term child means (1) the child or legally adopted child of an individual * * * a person shall be deemed as of the date of death of an individual to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but before the end of two years after the day on which such individual died * * * except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward support from someone other than such individual or his spouse or from any public or private welfare organization which furnishes services or assistance for children * * *".

The Regulations provide that for equitable adoption requirements there must be:

- "(1) An express contract to adopt the child (an implied contract suffices in some states), and
- (2) A legal consideration for the adopting parents' promise to adopt; and
- (3) In some states, a promise to give the child inheritance rights in the adopting parents' personal property; and
- (4) Surrender of the child to the adopting parents; and
- (5) Performance by the child under the contract; and
- (6) Sufficient lapse of time so that the child could have been legally adopted under applicable state law before the wage earner's death, or the time the child's application is filed if the wage earner is alive."

At a hearing held on February 26, 1970, at the Chamber of Commerce Building, Room 404, 89-31 161st Street, Jamaica, Long Island, New York, the claimant appeared with her attorney, George B. Schatz, Esq. The following witnesses were present and testified on behalf of the claimant: Geraldine Williams and Levenia Rose Williams, daughters of the claimant; Sherbert Williams, son of the claimant, and Valara Wilson, friend of the claimant.

At the hearing the claimant testified that the child, Wendell Lee Williams was born out of wedlock to her daughter, Geraldine Williams who was 14 years old and that the daughter was not capable of taking care of her child because it was her intention to finish her schooling. At that time the claimant and the wage earner, together with their daughter, Geraldine agreed that the child would be adopted by the wage earner and the claimant. The claimant and the wage earner went to the Court House in their home town and was advised that adoption proceedings could not be commenced until the child had been a member of their household for at least 6 months. The wage earner died on March 11, 1958, 2 months after the birth of the child. The claimant has supported this child since the date of his birth, and the mother of the child, Geraldine Williams, never supported the child, and because of an impairment had been institutionalized periodically.

An application was made by the claimant to the Circuit Court of Fayette County, West Virginia and an adoption decree was issued by the Circuit Court of Fayette County, West Virginia recorded November 13, 1961 wherein it was stated that the child, Wendell Lee Williams was the child of Lillian Williams. It should be noted that the decree of adoption recorded November 13, 1961 is more than 2 years after the death of the wage earner on March 11, 1958. Upon questioning by the Hearing Examiner the claimant stated that she was unable to complete the adoption of the child within the 2-year period as required by law because of the fact that she was unemployed, had no funds and was unable to defray the expenses of an adoption proceeding in Fayette County, West Virginia. When monies were available the adoption proceeding was commenced and completed by the recordation of the decree of adoption on November 13, 1961.

The witness, Valara Wilson testified that during the lifetime of the wage earner she was present at numerous conversations which took place between the natural mother of the child, Geraldine Williams and the claimant and wage earner wherein the natural mother stated that she would love to have the child adopted by her parents and that the wage earner and the claimant stated that it was their intention to adopt the child but they had to wait for a period of 6 months before proceedings could be commenced.

4

The son of the claimant, Sherbert Williams testified that his father had planned to adopt Wendell Lee Williams as his son and in conversations with the wage earner after the birth of the child the wage earner told him that he intended to adopt this baby as his own because of his daughter's youth and mental incapacity; that the wage earner told him that he planned to adopt Wendell Lee Williams and that there was a 6 month waiting period. His father died 2 months after the birth of the child.

The daughter of the claimant, Geraldine Williams, testified that she wanted her parents to adopt her child and they wanted to adopt her child so as to give the child proper care and a good home. The child was never informed that his natural mother was Geraldine; he has been raised all these years believing that the wage earner was his father and that the claimant was his mother.

A statement by Dr. Donald C. Howell, marked an exhibit in evidence states that he was acquainted with the wage earner and he delivered the child to the wage earner's daughter, Geraldine Williams on January 29, 1958. Geraldine was 14 years old at the time of her son's birth and was mentally retarded. The child, Wendell Lee Williams was born in his grandfather James Williams' home and the grandparents cared for the child and the child lived with them. The wage earner had indicated that because of his daughter Geraldine's youth and mental incapacity he and his wife intended to adopt the child and raise him as their own. He also stated that there was a 6 month waiting period before application for adoption could be made and before the expiration of the 6 month period the wage earner suffered a cerebral hemorrhage and died.

In the State of West Virginia an oral agreement is acceptable for equitable adoption and agreement to adopt may be implied. In that State there must be a trial or waiting period of six (6) months and said waiting period may not be waived in West Virginia where the wage earner was domiciled at the time of his death on March 11, 1958.

FINDINGS OF THE HEARING EXAMINER

After carefully considering all the evidence adduced at the hearing, together with all the exhibits now of record, the Hearing Examiner makes the following findings:

1. The child, Wendell Lee Williams, was born on January 29, 1958 and has lived with the claimant up until the present time and she has supported him entirely.
2. Subsequent to the birth of the child, and prior to the death of the wage earner, James O. Williams the mother of the child, Geraldine Williams, and


the claimant and the wage earner agreed among themselves that because of the youth of the mother of the child, and her mental impairments that in the best interest of the child the wage earner and the claimant would adopt this child as their own.

3. Prior to the death of the wage earner (March 11, 1958) he and the claimant went to the appropriate court in West Virginia where they were advised they would have to wait for more than 6 months before any proceeding could be commenced for the adoption of the child, Wendell Lee Williams by the wage earner and the claimant.
4. It was the intention of the wage earner and the claimant to adopt this child, Wendell Lee Williams as their own but the wage earner died prior to the expiration of the 6-month period.
5. A decree was entered and recorded in Fayette County, West Virginia on November 13, 1961 wherein the child, Wendell Lee Williams was the legally adopted child of the claimant, Lillian Williams.
6. Under applicable laws of West Virginia there was an equitable adoption of the child, Wendell Lee Williams by the wage earner, James O. Williams which would have qualified the child to share as the wage earner's child in the intestate personal property of the law of the State of West Virginia.
7. The child, Wendell Lee Williams may be deemed to be the legally adopted child of the wage earner as of the date of his death and/or equitable adopted child of the wage earner, James O. Williams before his death for the purposes of entitlement to child's insurance benefits.

DECISION

The child, Wendell Lee Williams is entitled to insurance benefits based upon the earnings record of the deceased wage earner, and the claimant, Mrs. Lillian Williams is entitled to mother's insurance benefits because she had in her care a child of the wage earner entitled to child's insurance benefits and their application, filed on October 18, 1967, must be granted within the meaning of the Social Security Act, as amended.

Date: March 17, 1970


 Harry J. Sands
 Hearing Examiner
 Social Security Administration

D-13263

Office of the General Counsel

August 7, 1970

GC:SS

James O. Williams, Account No. 236-10-2228
(Four Remonstrance of May 7, 1970)

Department of Hearings and Appeals, Appeals to Social
Security: John T. Allen, Counselor

SYLLABY

There are no West Virginia statutes or court decisions which indicate that the six month residence requirement for legal adoption may be waived.

(Williams, James O.--236-10-2228--GC (Dell'Acqua) to BHA)

CD 2-12 - West Virginia

When the deceased wage earner and claimant went to the appropriate West Virginia court to see about adopting child and child, who was being supported by wage earner at time of his death, was subsequently legally adopted by wage earner's surviving spouse more than two years after wage earner's death, hold wage earner's actions may be considered initiation of adoption proceedings for purposes of section 216(e) of the Act and child may be deemed legally adopted child of wage earner.
(Williams, James O.--236-10-2228--GC (Dell'Acqua) to BHA)

CD 2-12

ONLY COPY AVAILABLE

D-11100

Office of the General Counsel

August 7, 1970

CC:SS

James O. Williams, Account No. 956-10-2228
(Your memorandum of May 7, 1970)

Bureau of Hearings and Appeals, Appeals Council
Attention: John T. Allen, Member

1. The facts as they appear from your memorandum are as follows. The child, Wendell Lee Williams, born in West Virginia, On January 29, 1958, in the home of the deceased wage earner, James O. Williams, was the son of their unmarried daughter, Geraldine. Geraldine was at that time 14 years old, and she and the child continued making their home with her parents who always treated and supported Wendell Lee as if he were their child. The wage earner died, domiciled in West Virginia, on March 11, 1958, two months after Wendell's birth. From the testimony, the hearing examiner found that there was an agreement between the child's mother and her parents to adopt Wendell, and that, accordingly, he was the wage earner's equitably adopted child entitled to benefits.

2. You ask whether our opinion Lawrence Phillips, C-5815, January 7, 1949, still reflects the law of West Virginia. That opinion held that in West Virginia "equitable adoption" could not be established until after the expiration of the six-month period required by State law in the case of a legal adoption and that there were no statutes or court decisions indicating that the courts of West Virginia have discretionary power to waive the residence requirement.

3. The pertinent statutory provision provides "No . . . [adoption] petition shall be made or presented until after the child sought to be adopted shall have lived in the home of the adopting parent or parents for a period of six months." West Virginia Code section 48-4-1. 1/

4. We have not found any West Virginia statute modifying the six month residence requirement in section 48-4-1, supra. Nor, insofar as we can determine, have the courts of West Virginia ever considered whether the six month residence requirement for legal adoption is directory and

1/ This section was amended effective July 1, 1969, West Virginia Laws of 1969, Chapter 50. The six month residence requirements now appears in West Virginia Code section 48-4-1(b).

therefore, advisable. Generally, however, the West Virginia courts have construed the word "shall" when used in a statute as mandatory rather than directory. In Re Kane, 154 S.E.2d 860, 864 (W. Va., 1967); Board of Trustees etc. v. City of Huntington, 96 S.E.2d 225, 242 (W. Va., 1958); Edgar v. Gore, 90 S.E. 530, 531 (W. Va., 1916).

5. We note, however, that the hearing examiner, in addition to his decision with respect to equitable adoption, found that the child-claimant was the legally adopted child of the deceased wage earner as of the date of his death. It appears that this decision was based on the legal adoption of the child by the wage earner's surviving spouse on November 13, 1961. The adoption was more than two years after the wage earner's death on March 11, 1958. However, with respect to monthly benefits payable after January 1968, it is no longer necessary for the adoption to have been completed within two years of the wage earner's death if the child was living in the wage earner's household at the time of the wage earner's death and the deceased wage earner instituted adoption proceedings before his death. Section 216(e) of the Act.

It seems that the hearing examiner considered that the deceased wage earner had instituted "proceedings for the adoption of the child" before his death when he went to the appropriate West Virginia court to see about adopting the child-claimant and was advised that they would have to wait six months before proceedings could be commenced to adopt the child.

6. Section 150, Public Law 90-248, which amended section 216(e) of the Act, wholly eliminated any time period for the completion of a legal adoption where, inter alia, the insured had started some adoption proceeding during his lifetime. This amendment was made to ameliorate an unnecessarily strict provision where there was a good faith adoptive intent overtly manifested by the insured before the crucial point in time (here, the death of the insured). House Rep. No. 544, 90th Cong., 1st Sess., p. 52 states:

"In some cases, a surviving spouse, due to circumstances beyond her control, is unable to complete within 2 years of the worker's death an adoption started before his death. Your committee believes that where the worker initiated adoption proceedings, or the child was placed in the home by an adoption agency, prior to the worker's death, the child lost a source of support on the death of the worker."

Senate Report No. 744, 90th Cong., 1st Sess., p. 93, contains substantially identical language. While the legislative history does not specify what acts would constitute the initiation of adoption proceedings it is clear that the provision was intended to be less restrictive

with respect to after death adoptions where the child, as you have found in this case, was being supported by the wage earner at the time of his death and thereby lost a source of support. In our opinion this provision requires that the wage earner must, before his death, take some positive action which shows an adoptive intent. Apparently the hearing examiner, on the basis of testimony from the claimant which was corroborated by the testimony of other witnesses at the hearing, found that the wage earner had taken such positive action before his death. Accordingly, if you agree with the hearing examiner and find that the wage earner took the necessary action to institute adoption proceedings before his death you would not be legally precluded from determining that the child-claimant is entitled to benefits for months after January 1968 as the legally adopted child of the deceased wage earner.

Your materials are returned herewith.

Melvin Blumenthal
Assistant General Counsel

Enclosure

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of

Claim for

Lillian Williams for
Wendell Lee Williams
(Claimant)

Child's Insurance Benefits

James O. Williams
(Wage Earner)

236-10-2228
(Social Security Account Number)

This case is before the Appeals Council on its own motion to review the decision of the hearing examiner rendered on February 26, 1970. The claimant was advised of this action and of her and the child's rights with respect thereto.

The hearing examiner found that for Social Security purposes, Wendell Lee Williams may be deemed to be the legally adopted child of the deceased wage earner, James O. Williams, or his equitably adopted child. Thereupon he decided that Wendell is entitled to a child's insurance benefit and that Mrs. Lillian Williams is entitled to a mother's insurance benefit, both on the earnings record of the deceased. Mr. Williams.

In view of the applicable provisions of the Social Security Act and the evidentiary facts to which reference will be made, the Appeals Council does not agree with the hearing examiner's inferences, findings, or conclusions except as hereinafter may be indicated.

Pursuant to section 202(d)(1) of the Social Security Act, as pertinent, a child, which is defined in section 216(e) as "the child or legally adopted child," or a stepchild for a definite period, of a deceased insured individual may upon filing an application become entitled to a child's insurance benefit, provided certain requirements are first met.

Referred to section 216(e) of the Act, as amended, further provides, in pertinent part:

"* * * a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been

instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (1) the day on which such individual died * * *

Pursuant to section 216(h)(2) of the Act, a finding as to whether an applicant is a "child," as defined in section 216(e), of a deceased insured individual must be based on the law that would be applied in determining inheritance rights to intestate personal property by the courts of the state where the insured was domiciled at death.

The courts of several states, including West Virginia, apply the doctrine of "equitable adoption," whereby under certain circumstances a child is recognized as having the status and the rights of a child of an individual who had assumed an enforceable obligation to legally adopt him but failed to do so.

Section 202(g) of the Act provides that the widow of an insured individual may become entitled to a mother's insurance benefit if, among other conditions, she files an application therefor and at the time of filing she has in her care a child of such individual entitled to a child's insurance benefit.

The child, Wendell Lee Williams, born in West Virginia on January 29, 1958, in the home of the deceased wage earner, James O. Williams, and of his wife, Lillian Williams, was the son of their unmarried daughter, Geraldine. Geraldine was at that time 14 years old, and she and the child continued making their home with her parents who always treated and supported Wendell Lee as if he were their own child. The wage earner died, domiciled in West Virginia, on March 11, 1958 (Exhibit 3) two months after Wendell's birth.

The wage earner's widow legally adopted her grandchild, Wendell on November 13, 1961, as shown by the decree entered on that date by the circuit court of Fayette County, West Virginia (Exhibit 4). On October 18, 1967, she filed an application for child's insurance benefits for Wendell on the earnings record of the deceased wage earner (Exhibit 1).

The Social Security Administration determined that Wendell may not be deemed to be the legally adopted child of the deceased insured individual, James O. Williams, nor his equitably adopted child, and, therefore, that Wendell is not entitled to a child's insurance benefit, nor his adopting mother to a mother's insurance benefit, on Mr. Williams' earnings record. The hearing examiner is reversed.

From the testimony, the hearing examiner found that there was an agreement between the child's natural mother and her parents to adopt Wendell, and that, accordingly, he was the wage earner's equitable adopted child and entitled to benefits. The Appeals Council does not agree with this finding since it is inconsistent with the pertinent West Virginia Code section 48-4-1, which provides: "No * * * [adoption] petition shall be made or presented until after the child sought to be adopted shall have lived in the home of the adopting parent a period of six months." There can be no equitable adoption without sufficient lapse of time so that the child could have been legally adopted under applicable state law before the wage earner's death. Since the wage earner died two months after Wendell's birth, it is clear that the child did not live with him the required six months, and, accordingly, the Appeals Council finds that Wendell is not the equitably adopted child of James O. Williams.

Moreover, the Appeals Council does not agree that on the basis of the legal adoption of the child by his grandmother, Lillian Williams, he "may be deemed to be the legally adopted child of the wage earner as of the date of his death." Section 216(e) of the Social Security Act, as amended, provides that a person shall be deemed, as of the date of death of an individual to be his legally adopted child if that person was legally adopted by such individual's surviving spouse, but "only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual before the end of two years after (i) the day such individual died * * *." (Emphasis supplied)

The wage earner died on March 11, 1958, but his widow did not legally adopt the child until November 13, 1961 (Exhibit 4), which was more than two years later. Therefore, the child could be deemed to have been legally adopted by the wage earner only if the wage earner before his death instituted "proceedings for the adoption" pursuant to the statutory language underlined above. The testimony of the chairman and of other witnesses at the hearing shows that the wage earner and his wife merely inquired from somebody in a court in West Virginia about adopting their grandchild. In the opinion of the Appeals Council, this verbal and informal inquiry did not constitute the institution of adoption proceedings.

Furthermore, "proceedings for adoption" were not instituted and could not have been instituted because, as indicated above, State law did not permit the institution of such proceedings in this case. The pertinent statutory provisions clearly provide that "No * * * [adoption] petition shall be made or presented until the child sought to be adopted shall have lived in the home of the adopting parent or parents for a period of six months."

Since the wage earner died two months after the child was born, no adoption proceedings of any legal validity could have been instituted. Therefore, the Appeals Council finds that Wendell may not be deemed to be the legally adopted child of the deceased insured individual, James O. Williams.

The application filed by Lillian Williams on October 18, 1967, was for benefits for Wendell only. She did not file an application for benefits for herself in connection with her application for benefits for this child. In order for the widow of a deceased insured individual to become entitled to mother's insurance benefits she must file an application therefor, and, in addition, among other requirements, at the time of filing such application she must have in her care a child of the deceased entitled to a child's insurance benefit. Lillian Williams does not meet these requirements, and the Appeals Council so finds.

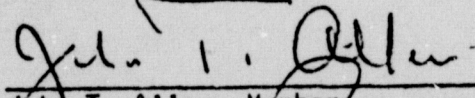
In view of the facts and the applicable law, the Appeals Council makes the following findings of fact and conclusions of law:

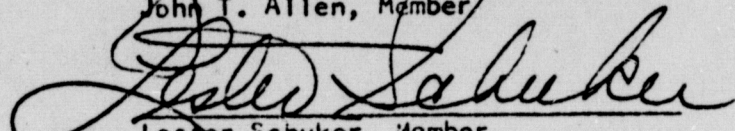
1. James O. Williams died a fully insured individual on March 11, 1958.
2. At the time of the death of James O. Williams and at all relevant times prior thereto he was domiciled in the State of West Virginia.
3. Wendell Lee Williams was the grandchild of the insured individual and was born in West Virginia on January 29, 1958.
4. Wendell Lee Williams did not live with James O. Williams during a 6-month period as required by the West Virginia law prior to a petition for adoption.
5. Wendell Lee Williams was not legally nor equitably adopted by the deceased insured individual.
6. Wendell Lee Williams was legally adopted by his grandmother, Lillian Williams, on November 13, 1961, which was more than two years after the insured individual's death.
7. Since James O. Williams did not institute proceedings for the adoption of Wendell before his death pursuant to section 216(e) of the Social Security Act, as amended, Wendell Lee Williams, may not be deemed to be the legally adopted child of the insured individual in this case.
8. Wendell Lee Williams is not and may not be deemed to be the insured individual's child, equitably adopted child, or legally adopted child.

9. Lillian Williams did not file an application for mother's insurance benefits in connection with her application for benefits for Wendell, and she does not have in her care a child of the deceased insured individual entitled to a child's insurance benefit.

It is the decision of the Appeals Council that on the earnings record of James C. Williams, Wendell Lee Williams is not entitled to a child's insurance benefit for which application was filed and Lillian Williams is not entitled to a mother's insurance benefit. The decision of the hearing examiner is reversed.

APPEALS COUNCIL


John T. Allen, Member


Lester Schuker, Member

Date: **OCT 12 1970**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

----- x
LILLIAN WILLIAMS,

Plaintiff,

-against-

COMPLAINT

ELLIOTT J. RICHARDSON,
SECRETARY OF HEALTH, EDUCATION
AND WELFARE,

Defendant.
----- x

LILLIAN WILLIAMS, by her attorneys, RUDES & SCHATZ, for her
complaint, alleges:

FIRST: This is an action in the Judicial District in which plaintiff
resides to review the decision of the Appeals Council pursuant to Section 205(g)
of the Social Security Act as amended (Section 405(g) Title 42, United States
Code).

SECOND: On October 18, 1967, the plaintiff filed with the Social
Security Administration an application and claim for infant's benefits under the
provisions of Section 202(d)(1) of the Social Security Act, as amended.

THIRD: The plaintiff's claim was disallowed and such disallowance
was affirmed on the reconsideration determination on the ground that no equitable
adoption of the child, Wendell Lee Williams, by the insured grandfather,
James O. Williams, occurred which would have qualified the boy to share
as the worker's child in intestate personal property, and that he thus is not
a child of the worker within the meaning of the Social Security Act; and further
on the ground that the child in question was legally adopted by the worker's

widow more than 2 years after the insured grandfather died and is not deemed to be the legally adopted child of the worker, James O. Williams as of the date of his death for purposes of entitlement to child's insurance benefits and that the claimant Mrs. Lillian Williams is not entitled to mother's benefits because she does not have in her care a child of the worker entitled to child's insurance benefits.

FOURTH: On June 10, 1969, the plaintiff requested a hearing before a Hearing Examiner of the Bureau of Hearings and Appeals.

FIFTH: On February 26, 1970, a hearing was held in Jamaica, Queens, New York, before Mr. Harry J. Sands, Hearing Examiner.

SIXTH: On March 17, 1970, the Hearing Examiner, Mr. Harry J. Sands, granted plaintiff's claim on the ground that under applicable laws of West Virginia there was an equitable adoption of the child by the wage earner which would have qualified the child to share as the wage earner's child in his intestate personal property under the law of the State of West Virginia and that therefore the child, Wendell Lee Williams, must be deemed to be the legally adopted child of the wage earner as of the date of his death and/or equitable adopted child of the wage earner, James O. Williams, before his death for the purposes of entitlement to child's insurance benefits.

SEVENTH: On October 12, 1970, the decision of the Hearing Examiner was reversed by the Appeals Council on its own motion.

EIGHTH: This action for review is commenced within 60 days from the date of the letter notifying plaintiff of the action of the Appeals Council.


NINTH: The aforementioned decision of the Appeals Council is not

in accordance with the law, is contrary to the facts and evidence presented and is arbitrary and capricious.

WHEREFORE plaintiff prays that the decision of the Appeals Council be reversed, that plaintiff's claim be allowed and the defendant be ordered to make payment to plaintiff in accordance with the law.

Dated: November 17th, 1970.

RUDES & SCHATZ,
Attorneys for Plaintiff


George B. Schatz,
Partner in the Firm,
149 Broadway,
Lynbrook, N.Y. 11563
Tel. 516 LYnbrook 9-8899

JDP:CIS:dew
File Number
702186

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

LILLIAN WILLIAMS,

Plaintiff,

A N S W E R

-against-

ELLIOT J. RICHARDSON, Secretary of
Health, Education and Welfare,

Civil Action
No. 70 C 1419

Defendant.

- - - - - x

The defendant, ELLIOT J. RICHARDSON,
Secretary of Health, Education and Welfare, by his
attorney, Edward R. Neaher, United States Attorney
for the Eastern District of New York, Carl I. Stewart,
Assistant United States Attorney, of counsel, in
answering the plaintiff's complaint, alleges:

FIRST: Denies each and every allegation
contained in paragraph designated "NINTH" of the
complaint.

SECOND: Further answering the allegations
contained in the complaint generally, defendant denies
that plaintiff is entitled to the relief for which she
prays under the applicable provisions of the Social
Security Act, as amended, and further states that the
facts and issues in this matter are fully set forth in
the administrative transcript, a copy of which is
attached hereto as part of the answer herein.

THIRD: The findings of fact of the
Secretary of Health, Education and Welfare are

supported by substantial evidence and are conclusive.

FOURTH: In accordance with the provisions of Section 205(g) of the Social Security Act, as amended [42 U.S.C. §405(g)], defendant files herein as part of this answer, a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based.

WHEREFORE, defendant prays for judgment dismissing the complaint together with the costs and disbursements of this action, and for judgment in accordance with Section 205(g) of the Social Security Act, as amended [42 U.S.C. §405(g)], affirming the decision complained of.

Dated: Brooklyn, New York
March 22, 1971

EDWARD R. NEAHER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

BY: /s/ Carl I. Stewart

CARL I. STEWART

Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
LILLIAN WILLIAMS,

Plaintiff,

-against-

ELLIOT J. RICHARDSON, Secretary of
Health, Education and Welfare,

Defendant.

NOTICE OF MOTION

CIVIL ACTION
NO. 70 C 1419

----- x
S I R :

PLEASE TAKE NOTICE that upon the Memorandum of Law served simultaneously herewith the undersigned will move before Hon. Walter Bruchhausen, United States District Judge, on January 25, 1974, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order awarding summary judgment to the plaintiff on behalf of Wendell Lee Williams, an infant, for child's insurance benefits on the Social Security account of James O. Williams, deceased wage earner, and for such other and further relief as the Court may deem proper in the circumstances.

PLEASE TAKE FURTHER NOTICE that you are required to serve upon the undersigned, five days before the return of this motion, your opposing Memorandum of Law.

Dated: Lynbrook, New York,
January 14, 1974.

TO:
EDWARD JOHN BOYD, V., ESQ.,
United States Attorney, Atty. for Deft.,
Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, N.Y. 11201

Yours, etc.,

Rudes & Schatz
RUDES & SCHATZ,
Attorneys for Plaintiff,
Office & P.O. Address,
119 Broadway,
Lynbrook, N.Y. 11563

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

----- x
LILLIAN WILLIAMS,

Plaintiff,

-against-

ELLIOT J. RICHARDSON,
SECRETARY OF HEALTH, EDUCATION
AND WELFARE,

Defendant.
----- x

M E M O R A N D U M

This memorandum is submitted in support of plaintiff's motion for summary judgment.

This case came before the Hearing Examiner upon a request for hearing filed on June 10, 1969, by Lillian Williams on behalf of Wendell Lee Williams, the claimant, on the social security account of James O. Williams, deceased wage earner, who disagreed with the determination of the Social Security Administration that she was not entitled to child's insurance benefits on behalf of Wendell Lee Williams.

The claimant on October 18, 1967, filed with the Administration an application for surviving child's insurance benefits on behalf of Wendell Lee Williams. The Administration disallowed the application on March 20, 1968, on the grounds that the child, Wendell Lee Williams, was not adopted by the

claimant within two years of the death of James O. Williams, the wage earner, or that the deceased wage earner had instituted proceedings to adopt the child before his death. The claimant requested reconsideration on October 1, 1968. Notice of disallowance after reconsideration was given to the claimant by letter dated February 7, 1969. The claimant disagreed with the Administration's reconsidered determination and requested a hearing.

STATEMENT OF ISSUES AND APPLICABLE LAW

The general issues before the Hearing Examiner were whether or not the child, Wendell Lee Williams, was entitled to child's insurance benefits, within the meaning of the Social Security Act, as amended.

The specific issues are whether or not the child, Wendell Lee Williams, was adopted within two years of the death of the wage earner, James O. Williams, or that the deceased wage earner had instituted proceedings to adopt the child before his death; or whether or not the child may be deemed to be the legally adopted child of the wage earner as of the date of death, or equitably adopted by the wage earner before his death for purposes of entitlement to child's insurance benefits.

Section 202(g) of the Act provides in effect that the widow of a worker is eligible for mother's insurance benefits on that worker's earnings record if among other conditions, she has in her care a child of the worker entitled to child's insurance benefits (for entitlement to widow's insurance benefits, a widow need not have an entitled child, or any child in her care but she must have attained age 50 under certain conditions and be disabled or age 60 to receive reduced widow's benefits or age 62 to qualify for full widow's benefit

payments).

Section 216() provides as pertinent to this case: "The term child means (1) the child or legally adopted child of an individual * * * a person shall be deemed as of the date of death of an individual to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but before the end of two years after the day on which such individual died * * * except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward support from someone other than such individual or his spouse or from any public or private welfare organization which furnishes services or assistance for children * * *".

The Regulations provide that for equitable adoption requirements there must be:

- "(1) An express contract to adopt the child (an implied contract suffices in some states), and
- (2) A legal consideration for the adopting parents' promise to adopt; and
- (3) In some states, a promise to give the child inheritance rights in the adopting parents' personal property; and
- (4) Surrender of the child to the adopting parents; and
- (5) Performance by the child under the contract; and
- (6) Sufficient lapse of time so that the child could have been legally adopted under applicable state law before the wage

earner's death, or the time the child's application is filed if the wage earner is alive."

At a hearing held on February 26, 1970, at the Chamber of Commerce Building, Room 404, 89-31 161st Street, Jamaica, Long Island, New York, the claimant appeared with her attorney, George B. Schatz, Esq. The following witnesses were present and testified on behalf of the claimant: Geraldine Williams and Levonia Rose Williams, daughters of the claimant; Sherbert Williams, son of the claimant, and Valara Wilson, friend of the claimant.

At the hearing the claimant testified that the child, Wendell Lee Williams was born out of wedlock to her daughter, Geraldine Williams who was 14 years old and that the daughter was not capable of taking care of her child because it was her intention to finish her schooling. At that time the claimant and the wage earner, together with their daughter, Geraldine, agreed that the child would be adopted by the wage earner and the claimant. The claimant and the wage earner went to the Court House in their home town and were advised that adoption proceedings could not be commenced until the child had been a member of their household for at least 6 months. The wage earner died on March 11, 1958, 2 months after the birth of the child, and the mother of the child, Geraldine Williams, never supported the child, and because of an impairment had been institutionalized periodically.

An application was made by the claimant to the Circuit Court of Fayette County, West Virginia, and an adoption decree was issued by the Circuit Court of Fayette County, West Virginia, recorded November 13, 1961 wherein it was stated that the child, Wendell Lee Williams was the child of Lillian Williams. It should be noted that the decree of adoption^{and} recorded November 13, 1961

is more than 2 years after the death of the wage earner on March 11, 1958. Upon questioning by the Hearing Examiner the claimant stated that she was unable to complete the adoption of the child within the 2-year period as required by law because of the fact that she was unemployed, had no funds and was unable to defray the expenses of an adoption proceeding in Fayette County, West Virginia. When monies were available the adoption proceeding was commenced and completed by the recordation of the decree of adoption on November 13, 1961.

The witness, Valara Wilson, testified that during the lifetime of the wage earner she was present at numerous conversations which took place between the natural mother of the child, Geraldine Williams, and the claimant and wage earner wherein the natural mother stated that she would love to have the child adopted by her parents and that the wage earner and the claimant stated that it was their intention to adopt the child but they had to wait for a period of 6 months before proceedings could be commenced.

The son of the claimant, Sherbert Williams, testified that his father had planned to adopt Wendell Lee Williams as his son and in conversations with the wage earner after the birth of the child the wage earner told him that he intended to adopt this baby as his own because of his daughter's youth and mental incapacity; that the wage earner told him that he planned to adopt Wendell Lee Williams and that there was a 6 month waiting period. His father died 2 months after the birth of the child.

The daughter of the claimant, Geraldine Williams, testified that she wanted her parents to adopt her child and they wanted to adopt her child so as to give the child proper care and a good home. The child was never informed that

his natural mother was Geraldine; he has been raised all these years believing that the wage earner was his father and that the claimant was his mother.

A statement by Dr. Donald C. Newell, marked as an exhibit in evidence states that he was acquainted with the wage earner and he delivered the child to the wage earner's daughter, Geraldine Williams, on January 29, 1958. Geraldine was 14 years old at the time of her son's birth and was mentally retarded. The child, Wendell Lee Williams, was born in his grandfather James Williams' home and the grandparents cared for the child and the child lived with them. The wage earner had indicated that because of his daughter Geraldine's youth and mental incapacity he and his wife intended to adopt the child and raise him as their own. He also stated that there was a 6 month waiting period before application for adoption could be made and before the expiration of the 6 month period the wage earner suffered a cerebral hemorrhage and died.

In the State of West Virginia an oral agreement is acceptable for equitable adoption and agreement to adopt may be implied. In that State there must be a trial or waiting period of six (6) months and said waiting period may not be waived in West Virginia where the wage earner was domiciled at the time of his death on March 11, 1958.

FINDINGS OF THE HEARING EXAMINER

Upon all the evidence adduced at the hearing, together with all the exhibits now of record, the Hearing Examiner made the following findings:

1. The child, Wendell Lee Williams, was born on January 29, 1958 and has lived with the claimant up until the present time and she has supported him entirely.
2. Subsequent to the birth of the child, and prior to the death of the wage earner, James O. Williams, the mother of the child, Geraldine Williams, and the claimant and the wage earner agreed among themselves that because of the youth of the mother of the child, and her mental impairments that in the best interest of the child the wage earner and the claimant would adopt this child as their own.
3. Prior to the death of the wage earner (March 11, 1958) he and the claimant went to the appropriate court in West Virginia where they were advised they would have to wait for more than 6 months before any proceeding could be commenced for the adoption of the child, Wendell Lee Williams, by the wage earner and the claimant.
4. It was the intention of the wage earner and the claimant to adopt this child, Wendell Lee Williams, as their own but the wage earner died prior to the expiration of the 6-month period.
5. A decree was entered and recorded in Fayette County, West Virginia on November 13, 1961 wherein the child, Wendell Lee Williams, was the legally adopted child of the claimant, Lillian Williams.

6. Under applicable laws of West Virginia there was an equitable adoption of the child, Wendell Lee Williams, by the wage earner, James O. Williams, which would have qualified the child to share as the wage earner's child in the intestate personal property of the law of the State of West Virginia.
7. The child, Wendell Lee Williams, may be deemed to be the legally adopted child of the wage earner as of the date of his death and/or equitable adopted child of the wage earner, James O. Williams, before his death for the purposes of entitlement to child's insurance benefits.

Upon the foregoing findings the Hearing Examiner decided that the child, Wendell Lee Williams, is entitled to insurance benefits based upon the earnings record of the deceased wage earner, and the claimant, Mrs. Lillian Williams, is entitled to mother's insurance benefits because she had in her care a child of the wage earner entitled to child's insurance benefits and their application, filed on October 18, 1967, must be granted within the meaning of the Social Security Act, as amended.

DECISION OF APPEALS COUNCIL

The Appeals Council, on its own motion, reversed the findings of the Hearing Examiner and ruled that:

1. James O. Williams died a fully insured individual on March 11, 1958.
2. At the time of the death of James O. Williams and at all relevant times prior thereto he was domiciled in the State of West Virginia.
3. Wendell Lee Williams was the grandchild of the insured individual and was born in West Virginia on January 29, 1958.
4. Wendell Lee Williams did not live with James O. Williams during a 6-month period as required by the West Virginia law prior to a petition for adoption.
5. Wendell Lee Williams was not legally nor equitably adopted by the deceased insured individual.
6. Wendell Lee Williams was legally adopted by his grandmother, Lillian Williams, on November 13, 1961, which was more than two years after the insured individual's death.
7. Since James O. Williams did not institute proceedings for the adoption of Wendell before his death pursuant to section 216(e) of the Social Security Act, as amended, Wendell Lee Williams, may not be deemed to be the legally adopted child of the insured individual in this case.
8. Wendell Lee Williams is not and may not be deemed to be the insured individual's child, equitably adopted child, or legally adopted child.

9. Lillian Williams did not file an application for mother's insurance benefits in connection with her application for benefits for Wendell and she does not have in her care a child of the deceased insured individual entitled to a child's insurance benefit.

THE DECISION OF THE HEARING EXAMINER SHOULD BE REINSTATED.

With respect to monthly benefits payable after January 1968, it is no longer necessary for the adoption to have been completed within two years of the wage earner's death if the child was living in the wage earner's household at the time of the wage earner's death and the deceased wage earner instituted adoption proceedings before his death. The hearing examiner properly considered that the deceased wage earner had instituted "proceedings for the adoption of the child" before his death when he went to the appropriate West Virginia court to see about adopting the child-claimant and was advised that they would have to wait six months before formal proceedings could be commenced to adopt the child.

Section 150, Public Law 90-248, which amended section 216(e) of the Act, wholly eliminated any time period for the completion of a legal adoption where, inter alia, the insured had started some adoption proceeding during his lifetime. This amendment was made to ameliorate an unnecessary strict provision where there was a good faith adoptive intent overtly manifested by the insured before the crucial point in time (here, the death of the insured. House Rep. No. 544, 9th Cong., 1st Sess., p. 52 states:

"In some cases, a surviving spouse, due to circumstances beyond her control, is unable to complete within 2 years of the worker's death an adoption started before his death.

Your committee believes that where the worker initiated adoption proceedings, or the child was placed in the home by an adoption agency, prior to the worker's death, the child lost a source of support on the death of the worker."

Senate Report No. 744, 90th Cong. 1st Sess., p. 93, contains substantially identical language. While the legislative history does not specify what acts would constitute the initiation of adoption proceedings it is clear that the provision was intended to be less restrictive with respect to after death adoptions where the child, as was found in this case, was being supported by the wage earner at the time of his death and thereby lost a source of support. It appears that this provision requires that the wage earner must, before his death, take some positive action which shows an adoptive intent. The hearing examiner, on the basis of testimony from the claimant which was corroborated by the testimony of other witnesses at the hearing, found that the wage earner had taken such positive action before his death. Accordingly, it is clear that the wage earner took the necessary action to institute adoption proceedings before his death and the hearing examiner was correct in determining that the child-claimant is entitled to benefits for months after January 1968 as the legally adopted child of the deceased wage earner.

The decision of the hearing examiner awarding benefits to the child-claimant and his adoptive mother should be re-instated.

Respectfully submitted,

RUDES & SCHATZ,
Attorneys for claimants,
by GEORGE B. SCHATZ

JDP:CIS:eh
F. #702186

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

LILLIAN WILLIAMS,

Plaintiff,

- against -

ELLIOT L. RICHARDSON,
Secretary of Health,
Education and Welfare,

Defendant.

----- X

Civil Action
No. 70 C 1419

MEMORANDUM OF LAW IN
OPPOSITION TO PLAIN-
TIFF'S MOTION FOR
SUMMARY JUDGMENT

EDWARD JOHN BOYD V
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

BORGE VARNER, ESQ.
Regional Attorney
Office of the General Counsel
Department of Health, Education & Welfare

CARL I. STEWART
Assistant U. S. Attorney
(Of Counsel)

ONLY COPY AVAILABLE

JURISDICTION

The court has jurisdiction over this action pursuant to Section 205(g) of the Social Security Act (42 U.S.C. §405(g)), to review a final decision of the Secretary of Health, Education, and Welfare. The final decision of the Secretary in this case is the decision of the Appeals Council rendered on October 12, 1970 (Tr. 3-8)*, reversing a decision rendered by a hearing examiner on March 17, 1970 (Tr. 12-17). The final decision held that Wendell Lee Williams was not entitled to child insurance benefits under 42 U.S.C. §402(d), on the ground that he was not the "child" of James O. Williams, the wage earner, within the meaning of 42 U.S.C. §416(c) and (h).

APPLICABLE LAW

A child claimant's eligibility for benefits is governed by Section 202(d) of the Social Security Act (42 U.S.C. §402(d)), which provides in relevant part:

(1) Every child (as defined in Section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an ... [insured] who dies a fully or currently insured individual, if such child--

* "Tr." refers to the administrative transcript, filed with the defendant's answer in this action.

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and ... had not attained the age of 18 ..., and

(C) was dependent upon such individual--

* * * *

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, ... at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit.

Section 216(e) of the Act (42 U.S.C. §416(e)), provides as follows:

(e) The term 'child' means (1) the child or legally adopted child of an individual For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died ... except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his

support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children....

Section 216(h)(2)(a) of the Act, (42 U.S.C. §416(h)

(2)(a)) provides:

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this title the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application...

APPLICABLE WEST VIRGINIA STATUTES

Section 48-4-1.

(a) It shall be lawful for any person not married, or any husband with his wife's consent, or any wife with her husband's consent, or any husband and wife jointly, to petition the circuit court or any other court of record having jurisdiction of adoption proceedings of the county wherein he, she or they may reside, or the judge of such court in vacation, for permission to adopt any minor child, and also to petition for a change of name of such child. Consent to the adoption of a minor child shall be required and obtained as follows:

(2) In the case of an illegitimate child sought to be adopted, the written consent, duly acknowledged, of the mother of such illegitimate child sought to be adopted must be obtained and presented with the petition. If the mother of

such illegitimate child is dead, insane, has abandoned the child sought to be adopted or has been deprived of the custody of the person of such child by law, then and in such case the written consent, acknowledge as aforesaid, of the legal guardian of such child or those having at the time the legal custody of the child shall be obtained and so presented, and if there be no legal guardian nor any person having the legal custody of the child, then such consent must be obtained from some discreet and suitable person appointed by the court or judge thereof to act as the next friend of such child in the adoption proceedings.

* * * *

(b) No petition for an adoption shall be made or presented until after the child sought to be adopted shall have lived in the home of the adopting parent or parents for a period of six months.

ISSUE

The only issue before the court in this action is whether the final decision of the Secretary, denying Wendell Lee Williams child insurance benefits on the ground that he was not the "child" of James O. Williams, is supported by substantial evidence.

FACTS

The plaintiff filed an application for child's insurance benefits on October 18, 1967 (Tr. 64-67). The record shows that the wage earner, James O. Williams, died on March 11, 1958 (Tr. 69), less than two months after the child claimant, Wendell Lee Williams, was born to Geraldine Williams, the daughter of the insured. The plaintiff testified at the hearing on February 26, 1970, that she and her husband, the deceased wage earner, had discussed adopting the child but did not institute proceedings because they were told that they had to wait six months (Tr. 39). In the subsequent adoption proceedings no notation was made that the deceased wage earner had intended to adopt the child (Tr. 47).

Plaintiff's daughter, Geraldine Williams, testified at the hearing that her parents had told her that they had intended to adopt the child claimant but that no papers were filed until after the death of the wage earner (Tr. 51).

36 ONLY COPY AVAILABLE

Plaintiff's son and another daughter also testified at the hearing (Tr. 55 et seq.) to the effect that their father intended to adopt the child claimant. A friend of the family testified to the same effect (Tr. 60). There is, in addition, an affidavit from Dr. D. C. Newell, who delivered the child, stating that the wage earner expressed his intention to adopt the child to the physician but died before the expiration of the six month waiting period for such adoption (Tr. 108).

ARGUMENT

At issue here is whether or not there is substantial evidence to support the final decision of the Secretary that Wendell Lee Williams did not acquire status as the "child" of the insured, James O. Williams, within the time and in the manner prescribed by the Social Security Act, so as to qualify him for child's insurance benefits on James' account. If there is substantial evidence to support the Secretary's decision, then that decision must be upheld. 42 U.S.C. §405(g); Franklin v. Secretary of Health, Education and Welfare, 393 F.2d 640 (2d Cir. 1968); Rocker v. Celebrezze, 358 F.2d 119 (2d Cir. 1966).

The Social Security Act provides that a child who otherwise qualifies may receive social security child's insurance benefits on the account of an insured individual who is entitled to social security benefits if the child is found to be the child of the insured within the meaning of the Act. 42 U.S.C. §402(d). For purposes of Section 402(d), a child is defined as "the child or legally adopted child of an individual." 42 U.S.C. §416(e).

Section 416(e) sets forth two conditions, one of which must be satisfied by any child alleging child's status based on his having been legally adopted after a wage earner's death. Thus, while the definition of "child" set forth in §416(e) includes a legally adopted child of an insured, certain

limitations are placed upon the meaning of "legally adopted child". Therefore, a child is deemed to be legally adopted if he was living with the insured and was legally adopted after the insured's death by the insured's surviving spouse but only if "(A) proceedings for the adoption of the child had been instituted by such individual before his death or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died...." 42 U.S.C. §416(e).

The wage earner died on March 11, 1958 (Tr. 69). Therefore, either formal adoption proceedings must have been instituted by him prior to his death, or the child must have been adopted by the surviving spouse within two years after that date. The evidence clearly establishes that no adoption proceeding was instituted prior to the death of the insured and that the legal adoption was granted to his surviving spouse on November 14, 1961, more than three years after his death. Accordingly, as neither the requirements of subsection (A) nor subsection (B) were met, the child may not be deemed to be the legally adopted child of the insured under §416(e). Bray v. Gardner, 268 F. Supp. 328 (E.D. Tenn. 1967).

The remaining issue for decision is whether Wendell, although not having been formally adopted by the wage earner's surviving spouse within the prescribed time limit so as to

qualify as a legally adopted child, was "equitably adopted" by the wage earner. Thus a child claimant may satisfy the status requirement of §416(c) and §416(h)(2)(a), if he is "equitably adopted" by the wage earner, that is, if under the law of the wage earner's domicile he would have inheritance rights under a contract to adopt. In this connection it must be noted that the "equitable adoption" principle is a state law rule which is considered to satisfy the state law inheritance test of §416(h)(2)(a) and thereby confer the necessary status. The inheritance test does not however satisfy, and indeed has no relevance to the provisions of the Act, including those in §416(c), which refer to legal adoption. It is established that the federal law requirement of legal adoption in those sections means a formal adoption proceeding. See Craig v. Finch, 425 F.2d 1005 (5th Cir. 1970). Therefore the provisions of §416(c) which confer deemed child's status on a child legally adopted within two years after a wage earner's death by his surviving spouse cannot be satisfied by "equitable adoption" of the child by the surviving spouse. A child claimant, however, may qualify as a "child" (rather than as an individual deemed to be a "legally adopted child" because he was legally adopted by the wage earner's surviving spouse) if by the time of the wage earner's death the latter had "equitably adopted" him. It is submitted however that the facts herein do not support such a finding.

It is not disputed that West Virginia, where the wage

11

earner was domiciled, recognizes the inheritance rights of an "equitably adopted" child. The doctrine of "equitable adoption" has been applied in cases where the adoptive parents who contracted or agreed with the child (or natural parent or some other person acting on behalf of the child) to adopt the child, failed to do so. Calvert v. Johnson, 304 S.W.2d 394 (Ct. of Civil App. Texas 1957); In re Rowe's Estate, 132 N.W. 2d 180 (S.Ct. Minn., 1964). The doctrine rests on the maxim that "equity regards that as done which ought to have been done." However, even if the insured agreed with his daughter to adopt the child claimant, an equitable adoption cannot be found on the facts here because the wage earner could not possibly have performed the contract - he died less than two months after the child's birth and thus before the expiration of the six-month waiting period required by West Virginia law.

The rule that no equitable adoption takes place where a wage earner dies before the statutory requirements for a formal adoption have been satisfied was pointed out in the case of Spiegel v. Flemming, 181 F.Supp. 185 (N.D. Ohio 1960). After noting that the wage earner had died before the expiration of the statutory six-month period that the child was required to reside with the adoptive parents, the court, in affirming the Secretary's decision that the child lacked status as either an adopted or "equitably adopted" child stated:

...the adoption of [the child claimant] could not have been effected prior to the wage earner's death. The critical facts that justified the application of the principle of equitable adoption in the cited cases are absent in the case under review.

It is submitted therefore that the facts and applicable law in this case require that the Secretary's decision be affirmed. It must be emphasized that the fact that the child lived with and was supported by the wage earner is not alone sufficient to bring him within the law's provisions.

Sections 402(d), 416(e) and 416(h)(2)(a) clearly require that in addition to economic dependency, a child must have had the specified legal or biological relationship to the wage earner. Congress has repeatedly considered and rejected the in loco parentis test whereby a child might qualify on the wage record of anyone who lived with him and supported him as a parent.* It should be pointed out that notwithstanding the wage earner's early death the plaintiff was not precluded from qualifying the child claimant for benefits. She could have formally adopted him herself within two years from the wage earner's death and thus brought him within the definition of a legally adopted child.

* See Congressional Record, July 6, 1964, pages 16046 to 16047; Congressional Record, February 3, 1965, pages 1787 to 1788; Hearing before the Committee on Ways and Means, House of Representatives, 90th Cong., 1st Sess. on H.R. 5710, March 1, 2, and 3, 1967, Part 1, page 87.

CONCLUSION

The Secretary's decision, that the plaintiff, Lillian Williams, is not entitled to child's insurance benefits on behalf of the child claimant, Wendell Williams, because the latter was not the "child" of the deceased wage earner, James O. Williams, conforms to the applicable law and is supported by substantial evidence in the record. Speigel v. Flemming, supra. It should therefore be affirmed.

Dated: Brooklyn, New York
March , 1974

Respectfully submitted,

EDWARD JOHN BOYD V
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

Borge Varmer, Esq.
Regional Attorney
Office of the General Counsel
Department of Health, Education & Welfare

Carl I. Stewart
Assistant U. S. Attorney
(Of Counsel)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

LILLIAN WILLIAMS,

Plaintiff,

-against-

ELLIOT L. RICHARDSON, Secretary
of Health, Education and Welfare,

Defendant.

- - - - - x

Appearances:

RUDES and SCHATZ, ESQS
Attorneys for Plaintiff

EDWARD JOHN BOYD V, ESQ
United States Attorney
Attorney for Defendant
By: CARL I. STEWART, ESQ
Assistant U.S. Attorney
Of Counsel

BRUCHHAUSEN, D. J.

The plaintiff moves for an order for summary judgment on behalf of the infant, Wendell Lee Williams, for the child's benefits on the Social Security account of James O. Williams, deceased wage earner.

This action was commenced, pursuant to Section 205(g) of the Social Security Act, as amended, 42 U.S.C. §405(g), for a judicial review of the final determination of the Secretary of Health, Education and Welfare. The Secretary's authorized representative conducted hearings and ruled that the infant, Wendell Lee Williams, was a child within the meaning of 42 U.S.C. §416(e) and (h), and that the claimant was entitled to insurance benefits thereunder.

The Appeals Council on its own motion reviewed the decision of the hearing examiner, and by its order dated October 12, 1970 reversed the decision of the hearing officer and held that the claimant was not entitled to benefits under the Act. The decision of the Appeals Council became the final decision of the Secretary.

The sole issue to be determined is whether the final decision of the Secretary in denying child insurance benefits on the ground that he was not the child of James O. Williams, is supported by substantial evidence.

The Congress of the United States in its

enactment of the Statute, has limited the power of a District Court to a review of the proceedings, had before the Social Security Administration. The governing Statute, 42 U.S.C. §405(g) states:

"The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive ***."

See Price v. Folsom, 168 F. Supp. 392, affirmed 28 F.2d 956, cert. denied 365 U.S. 817; Eastern v. Secretary of Health, Education and Welfare, 364 F. 2d 509(1966); Richardson v. Perales, 402 U.S. 389.

It would serve no useful purpose to restate each applicable section of the Act or the evidence adduced during the hearings before the hearing officer. Suffice it to say, that the Court has carefully considered the record, arguments, together with the applicable law, and concludes that there was amply substantial evidence to justify the administrative determination. See Spiegel v. Flemming, 181 F. Supp. 185.

The motion of the plaintiff is denied and the complaint is dismissed.

It is so ordered.

Copies hereof have been forwarded to the attorneys
for the respective parties.

Harold Blackman
Senior U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
LILLIAN WILLIAMS,

Plaintiff,

-against-

ELLIOT L. RICHARDSON, Secretary
of Health, Education and Welfare,

Defendant.
----- x

NOTICE OF APPEAL

INDEX NO. 70 C 1419

S I R S :

PLEASE TAKE NOTICE that the above named plaintiff hereby appeals to the United States Circuit Court of Appeals from an Order of Senior United States District Judge Walter Bruchhausen made on March 20, 1974, denying the motion of the plaintiff for summary judgment and dismissing her complaint and from each and every part of the said Order.

Dated, April 25, 1974.

Yours, etc.,

RUDES & SCHATZ,
Attorneys for Plaintiff,
Office & P.O. Address,
149 Broadway,
Lynbrook, N.Y. 11563

TO:

CLERK OF THE U.S. DISTRICT COURT
for the Eastern District of New York

EDWARD JOHN BOYD V, ESQ.,
United States Attorney,
Attorney for Defendant.